In the High Court of Judicature for Rajasthan

Jaipur Bench

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Cr. Misc. Petition No.109/1999
Sanjeev Jain & Ors.
Versus State & Anr.

Date of Order ::: 23/10/07

Hon'ble Mr. Justice Ajay Rastogi

Mr. Virendra Dangi, for petitioners
Mr. Arun Sharma, Public Prosecutor for State.

Instant Misc. Petition U/s 482 CrPC is directed against taking cognizance of offences U/Ss 27(b)(i), 27(c) & 27(d), for contravention of provisions in Ss. 18(a)(i), 18(a)(vi), 18(c) read with S.16(1)(a), 17(c), 17-A(f) 17-B(d) of Drugs & Cosmetics Act, 1940 (“**the Act**”) vide order dt.29/07/97 and summoning petitioners (accused No.5, 6 & 7 in Cr. Complaint No.23/291/97 pending before Chief Judl. Mag. Alwar.

Petitioners (accused No.5, 6 & 7 in complaint) are Directors of M/s Welcure Pharmaceuticals (P) Ltd. (accused No.3) (“**Company**”), engaged in selling & distributing drugs & medicines manufactured in factory of M/s Welcure Drugs & Pharmaceuticals Ltd (accused No.8) situated at A-1129, RIICO Industrial Area, Phase-III, Bhiwari (Alwar).

On 23/03/95, Drugs Inspector, Alwar visited Bansal Medical Store (Pharmaceutical Distributors) Industrial Area, Bhiwadi (Alwar) and purchased 4 x 100 Tablets of Oxyphen-butazone vide bill No.4887/dt.23/03/95 having batch No.T-117, manufacturing date November, 1994 & Expiry date October, 1997, and divided it into four equal parts in the form of its sample and thereafter sealed in accordance with Rules – one sample whereof was sent for analysis to the Public Analyst, Rajasthan, Jaipur, who in its report dt.15/09/95 opined that sample does not conform to the claim with respect to assay of Oxyphen butazone as it contains phenylbutazone -

Oxyphenbutazone found 64.69mg. Claim 100mg.
Phenylbutazone claim Nil found 37.84 mg.

a copy whereof alongwith one sample vide show cause notice dt.04/10/95 through registered post was sent by Drugs Inspector to the Company (accused nO.3) and Brij Mohan Bansal Prop., Bansal Medical Store (accused No.1) who in response informed that sample of drugs was purchased from M/s Welcure Pharmaceuticals (P) Ltd. (accused No.3) vide bill dt.23/03/95 – copy whereof was sent alongwith letter dt.14/10/95 while acknowledging analyst report dt.15/09/95.

The Company (accused No.3) controverted State analyst report dt.15/09/95 and requested for sending referee sample to the Central Drugs laboratory, Calcutta - as per its analyst report, sample was found to be misbranded under the Act as is evident from letter No.252 dt.28/05/96 referred to in letter dt.09/04/97 (p.111 of the record) which is written sanction from competent authority and accordingly, Drugs Inspector filed complaint on 29/07/97 for prosecution against petitioners as well as other accused for offences (supra). However, complaint was registered and learned Magistrate took cognizance of offences (supra) and issued process against petitioners (accused No.5, 6 & 7) and other accused vide order dt.29/07/97. Hence this petition.

Basic grievance raised by petitioners in instant petition is that petitioners are only Directors of M/s Welcure Pharamceuticals (P) Ltd (accused No.3) which has purchased sample of drug from manufacturing company (accused No.8) and then sold it to Bansal Medical Store (accused No.1) from whom sample was taken by Drugs Inspector. Counsel submits that there is not a shred of evidence in the complaint against petitioners as to how and in what manner they

were in-charge of and responsible for conduct of business of the distributing Company (Accused No.3) at the time of commission of alleged offences, or the petitioners as Directors of the Welcure Pharmaceuticals (P) Ltd have committed alleged offence and in absence of necessary ingredients as required by S.34(1) of the Act being disclosed in complaint, a vague reference of responsibility is not sufficient compliance of requirement U/s 34 of the Act; therefore, very cognizance taken of offences (supra) against petitioners vide order impugned is not legally sustainable. In support, Counsel placed reliance upon decision of Apex Court in **Municipal Corpn Delhi Vs. Ram K.Rohtagi (AIR 1983 SC 67); State of Haryana Vs. Brijlal Mittal (AIR 1998 SC 2327) & SMS Pharmaceuticals Ltd Vs. Neeta Bhalla (2005 (8) SCC 89)** and of this Court **in Bharat Insecticides Ltd Vs. State of Rajasthan (1996 (1) RLR 349) and M/s Cadila Health Care Ltd Vs. State (DB) (2007(1) RLR 389).**

Public Prosecutor supported the order impugned and submits that petitioners are Directors of Company (accused No.3) and as per material on record, all the three Directors are

directly in charge and responsible to the Company (accused No.3) for conduct of its business and that apart, all such objections raised herein can be agitated in course of trial and since complaint discloses commission of offences, summons have rightly been issued to the offenders and as such no error has been committed while taking cognizance impugned and this petition deserves to be dismissed.

I have considered contention of Counsel for both the parties and with their assistance examined material on record. It is true that proceedings at initial stage is ordinarily not to be interfered with but if on the face of complaint which lacks of material particulars for commission of offence under the Act, the Court should not be hesitant to invoke powers U/s 482, CrPC.

In the complaint, facts have been disclosed that petitioners are Directors of Distributing Company (accused No.3) and sample sent to the State Public Analyst for analysis was found to be misbranded and its analysis report was sent to the accused named in the complaint and they controverted the report, as well and as per S.25(3) of the Act, referee sample was got

re-tested by Central Laboratory before expiry of shelf life of the sample.

It is trite that penal provisions must be strictly construed in its first place; and no vicarious liability in criminal law can be fastened unless statute takes it also within its fold. S.34 of the Act deals with offences by Companies and does not make all the Directors liable for commission of offences on the part of the company merely because of their holding office of Directors. As per S.34 of the act, persons categorised ad infra -

(i) the company itself; and
(ii)every person incharge of or responsible to the company for conduct of its business at the time of commission of alleged offence.
(iii)Any director, manager, secretary or other officer of the Company, if offence alleged is committed with the consent or connivance or is attriutble to any negligence on his part;

can be liable tobe prosecuted and convicted of an offence under the Act allegedly committed by a Company.

However, burden to prove the charge of an offence under the Act always lies upon the prosecution unless otherwise provided under special provisions of law for the accused to satisfy the Court that offence was committed

without his knowledge or his consent or connivance or it was not attributable to any neglect on his part.

In Companies, there can be Directors who are not either related to or in charge or responsible for the conduct of or are not concerned with overall control of the day to day business of the Company. Mere fact that the accused persons happen to be Directors of the Company; it will not make them vicariously liable for commission of offence on the part of the Company unless ingredients as required under the Act are prima facie made out from complaint for making them criminally liable.

As regards law on the ground urged at the bar, it stands settled by virtue of decision of Apex Court in **State of Haryana Vs. Brijlal Mittal (supra) Apex Court** observed :

> "It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in-charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfills both the above requirements so as to make him liable.

> Conversely, without being a director a person can be in-charge of and responsible to the company for the conduct of its business. ”

In **M/s Cadila Health Care Ltd Vs. State (supra**) this Court (DB) observed while examining scope of S.34 of the Act ad infra: -

> “**21.** The crucial test which has been laid down by the Hon'ble Supreme Court on the issue of Director being 'in charge of' & 'responsible to the company for the conduct of business of the company' as required under section 34 of the Act is that the Director is concerned with the day-to-day working of the company, or in other words, for over-all control of the day-to-day business of the company or firm which excludes Directors connected with policy of the company. The Director may not be in charge of business of the company or may be in charge of business of the company but not over all in charge or may be in charge of only some part of business and further test as regards averments/allegations made in the complaint, the Supreme Court had laid down that words mentioned in the section are not the magic words but the substance of the allegations be read as a whole. ”

In **SMS Pharmaceuticals Ltd Vs. Neeta Bhalla**

(Supra), while dealing with S.141 of Negotiable Instruments Act, 1881, which is pari materia to S.34 of the Drugs Act on similar facts Apex Court observed ad infra :-

> "In view of the above discussion, our answers to the questions posed in the Reference are as under:
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> **(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint**. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.
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> **(b)** The answer to question posed in sub-para (b) has to be in negative. **Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act.** A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the

> business of the company at the relevant time. **This has to be averred as a fact as there is no deemed liability of a director in such cases**.” **(emphasis added**)

In instant case, only fact referred to in the complaint with regard to the act of instant petitioners (accused No.5, 6 & 7) showing them being either in charge of or responsible to the Company for conduct of its business, as required by S.34 of the Act is reproduced from page 16 sub-para (ख) of para 20 of complaint ad infra:

> “यह कि अभियुक्त फर्म संख्या 4,5,6 व 7 जो कि फर्म अभियुक्त संख्या 3 के डायरेक्टर है उपरोक्त धटित अपराध के लिये फर्म अभियुक्त संख्या 3 के साथ अलग अलग व सामूहिक रूप से जिम्मेवार है "

In view of what has been observed (supra), very complaint filed against petitioners is not sustainable in the eye of law as it completely lacks of basic ingredients as required U/s 34 of the Act and on a perusal of entire complaint, there is not an iota of allegation in the complaint which may disclose of petitioners being 'in-charge of' and 'responsible for the conduct of business of distributing Company' (accused No.3) for day-to day or having over-all control over its business in order to make them

vicariously liable for commission of offence and except a vague statement that they are Directors of the Company (accused No.3). Material disclosed in instant complaint does not create any such vicarious liability qua petitioners. Hence order taking cognizance of offence and issuing process for summoning petitioners is of no legal significance and to prosecute the petitioners in instant case will be nothing but an abuse of process of law.

Although this Court is going to set aside the order impugned but would like to point out that Section 319, CrPC certainly empowers the Court to take cognizance against persons not being the accused before it and try them along with other accused already standing at trial, in case prosecution during trial at any stage produce evidence satisfying the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence, at that stage the Court can take cognizance against them and try them along with the other accused as has been observed by Apex Court in **Municipal Corp. Delhi vs. Ram Kishan Rohtagi (1983 (1) SCC 1**) ad infra:

> **"19.**In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extra ordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say any thing further at this stage. We leave the entire matter to the discretion of the court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondent Nos.2 to 5 will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it."

Consequently, misc. petition succeeds and is hereby allowed. Complaint and further proceedings qua petitioners (accused No.5, 6 & 7

in complaint) initiated vide order dt.29/07/97 of Chief Judl. Mag. Alwar are quashed and set aside at this stage.

However, in the light of what has been observed (supra), this Court makes it clear that mere quashing of proceedings against petitioners will not prevent the trial Court from exercising its discretion U/s 319, CrPC, if it is fully satisfied that a case for taking cognizance against them has been made out on evidence led before it in course of trial.

Record be sent back forthwith to the court below to proceed in accordance with law and expedite the trial.

(**Ajay Rastogi), J.**

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